Office-Supreme Court, U.S.
FILED
JUL. 3 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1965

No. 145

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

against

JOHN MILLER,
Petitioner.

On Petition for a Writ of Certiorari to the Appellate Term of the Supreme Court of the State of New York for the First Judicial Department

RESPONDENT'S BRIEF IN OPPOSITION

FRANK S. HOGAN
District Attorney
New York County
Attorney for Respondent
155 Leonard Street
New York, N. Y. 10013

H. RICHARD UVILLER
ERIC A. SEIFF
Assistant District Attorneys
Of Counsel

TABLE OF CONTENTS

	PAGE
PRELIMINARY STATEMENT	1
QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	2
APPLICABLE STATUTE	3
The Code of Criminal Procedure of the State of New York, Section 887(7)	3
SUMMARY OF ARGUMENT	3
POINT I—The application for certiorari should be dismissed	3
POINT II—The defendant is now precluded from arguing that the state statute [Code of Criminal Procedure §887(7)] does not apply to him	5
POINT III—The statute is constitutional	5
CONCLUSION	8

TABLE OF AUTHORITIES

Cases:

Fiswick *et al.* v. United States, 329 U. S. 211 (1946)	4
Parker v. Ellis, General Manager, Texas Prison System, 362 U. S. 574 (1959)	4
People v. Gillespi and People v. Johnson, 15 N. Y. 2d 529 (1964)	5

PAGE

People v. O'Gorman, 274 N. Y. 284 at 287 (1937) 6

St. Pierre v. United States, 319 U. S. 41 (1943) 4

Winters v. New York, 333 U. S. 507 (1948) 5

Statutes:

Code of Criminal Procedure of the State of New York, Section 887(7) 2, 3, 6, 8

Laws of 1845 of the State of New York, Chapter 3 6

Public Health Law of the State of New York, Chapter 7, Regulation 9 7

Sanitary Code of the City of New York, Regulations 1 and 2 7

Other Authorities:

59 Yale L. J. 1351, 1353 and nn. 7 and 8 (1950) 8

Governor Wright's Message to the Legislature, New York Tribune, January 8, 1845 6

IN THE

Supreme Court of the United States

October Term, 1965

No. 145

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

against

JOHN MILLER,
Petitioner.

On Petition for a Writ of Certiorari to the Appellate Term of the Supreme Court of the State of New York for the First Judicial Department

RESPONDENT'S BRIEF IN OPPOSITION

Preliminary Statement

This is a petition for a writ of certiorari to the Appellate Term of the Supreme Court of the State of New York for the First Judicial Department, to review a judgment of that court rendered December 17, 1964, affirming a judgment of the Criminal Court of the State of New York, County of New York, of March 31, 1964, convicting petitioner of the offense of VAGRANCY [Code of Criminal

Procedure of the State of New York, §887(7)]. The sentence of two days in the Workhouse was suspended (16).* Leave to appeal to the New York Court of Appeals was denied by a judge of that court [FULD, J.] on February 16, 1965.

Questions Presented

1. Whether mootness commands the dismissal of the present petition.

2. Whether the New York Vagrancy statute [Code of Crim. Proc., §887(7)] prohibits a man from disguising himself as a woman and appearing in public with an intent to deceive.

3. Whether this statute is unconstitutionally vague and indefinite.

4. Whether this statute exceeds the constitutional bounds of the state's police power.

Statement of the Case

On March 24, 1963, at about 2:30 p.m., the arresting officer observed the defendant walking north on Manhattan's West End Avenue, between 91st and 92nd Streets, "dressed in female attire, a shirt, female [gray tinted] wig, high heels, a purse and a fur cape. He also had on his lips painted lipstick, and a powder base giving a rouge

* References, unless otherwise noted, are to the page numbers of the typewritten minutes of trial.

effect to his cheeks" (7-8). In sum, he appeared to be "a man dressed as a woman—an elderly woman" (9). When first questioned by the police officer, the defendant gave his name as "Joan Miller" (8).

Applicable Statute

The Code of Criminal Procedure of the State of New York

"§887 **Who are vagrants.** The following persons are vagrants:

* * *

7. A person who, having his face painted, discolored, covered or concealed, or being otherwise disguised, in a manner calculated to prevent his being identified, appears in a road or public highway".

Summary of Argument

The certiorari application must be dismissed as moot. This Court may not inquire if the courts below properly applied the statute in question. The meaning of that statute has been fixed for the purpose of this proceeding. That meaning is neither unclear nor uncertain, and represents a proper exercise of the enacting legislature's power.

POINT I

The application for certiorari should be dismissed.

The defendant, whose sentence has run without the attachment of prejudicial legal after-effects, is no longer able to obtain further judicial review. The issue being moot, he is precluded from the writ he now seeks. As this

Court held in *St. Pierre* v. *United States,* 319 U. S. 41, 42-3 (1943), in dismissing the certiorari petition:

> "A federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it (cits. om.). The sentence cannot be enlarged by this Court's judgment, and reversal of the judgment below cannot operate to undo what has been done or restore to petitioner the penalty of the term of imprisonment which he has served. Nor has petitioner shown that under either state or federal law further penalties or disabilities can be imposed on him as a result of the judgment which has now been satisfied."

This Court reaffirmed its position in *St. Pierre,* when it observed in *Parker* v. *Ellis, General Manager, Texas Prison System,* 362 U. S. 574, 575 (1959), "We have applied these principles to deny the writ of certiorari for mootness on the express ground that petitioner was no longer in Respondent's custody in at least three cases not relevantly different from the present one (cits. om.)."

Since the defendant's sentence was two days in the Workhouse, the execution of which was suspended, and that two days has long since run, he is no longer subject to any penalties. Moreover, as there are no "other disabilities or burdens" [*Fiswick et al.* v. *United States,* 329 U. S. 211, 222 (1946)] flowing from the judgment below, no exception exists to the present application of the mootness doctrine.

POINT II

The defendant is now precluded from arguing that the state statute [Code of Criminal Procedure §887(7)] does not apply to him.

In companion cases considered by the Court of Appeals of the State of New York, the applicability of the vagrancy statute to transvestitism was affirmed. See *People* v. *Gillespi* and *People* v. *Johnson,* 15 N. Y. 2d 529 (1964). While no opinion was written it is clear that the prosecution's theory in those cases, as in the one at bar, rested upon a showing of an intent to deceive. It is this interpretation which was urged in the trial court (16), and which, it is respectfully submitted, is binding on this Court. As was succinctly stated in *Winters* v. *New York,* 333 U. S. 507, 514 (1948), the state's interpretation "fixes the meaning of the statute for this case". Therefore, the defendant may no longer complain that his conduct was beyond the interdictions of the governing code. The state courts have ruled otherwise, thus formulating the law of the case.

POINT III

The statute is constitutional.

Defendant also contends that the statute in controversy is unconstitutionally "vague, indefinite and uncertain" (petition, p. 7). He is in error. In the *Winters* case (*Winters* v. *New York,* 333 U. S. at p. 515) this Court ruled that legislation is not unconstitutionally unclear so long as it sets up "ascertainable standards of guilt. Men of common intelligence cannot be required to guess at the meaning of the enactment." This language, which has since

become a navigational marker for legislative drafters, provides the applicable test, and section 887(7) meets it. Men of common intelligence can determine both the persons who fall within the scope of the prohibition and the exact behavior forbidden.

Interestingly, the legislative history of §887(7) reveals that at its inception the statute was designed to deal not with all disguises and devices but specifically with men wearing women's dresses. The forerunner of §887(7), Chapter 3 of the Laws of 1845, was passed originally to deal with certain insurrectionists, commonly known as "Indians," who were murdering writ-serving law enforcement officers (see Governor Wright's Message to the Legislature, New York Tribune, January 8, 1845). As part of their costume, these "Indians" wore women's calico dresses, which, of course, helped frustrate identification and apprehension.

Petitioner further contends that the statute as applied to transvestites is an unreasonable, arbitrary, unconstitutional exercise of the police power (petition, pp. 6-7). It is well-recognized that whenever a state's police power comes in conflict with freedom of expression, some balancing process must take place. Thus, "People can dress as they please, wear anything, so long as they do not offend public order and decency." *People* v. *O'Gorman,* 274 N. Y. 284, at 287 (1937). But transvestites do offend public order and decency.

The dress of the opposite sex is potentially the most effective of all disguises because it is the most subtle. So

basic is a person's sex to his identity, that in most cases law enforcement officers in search of a person initially narrow the scope of inquiry to "male or female?" Transvestites are therefore as effectively disguised as if they were masked.

Furthermore, separate and apart from the function the statute serves in the area of crime detection, transvestites, such as the defendant, directly offend and contradict the order of our contemporary culture. Much of our societal conduct is based on the ingrained assumption that those we encounter may be classified as either male or female, and we respond differently, making numerous decisions on the basis of sex. Almost all means of identification such as birth certificates and drivers' licenses indicate the sex of an individual. Selective Service cards must be carried as evidence of registration by males but not females. Indeed, it is fair to observe that personal and commercial relations are ordinarily established with considerations of sex pervading. By hiding in the guise of women, transvestites necessarily frustrate minimum standards of societal order. Camps, beaches, hospitals, hotels, restaurants and other places of public accommodation must, under law, provide separate facilities for each sex (see, for example, Public Health Law of the State of New York, State Sanitary Code, Chapter 6, Regulation 11; Chapter 7, Regulation 9; Sanitary Code of the City of New York, Regulations 1 and 2). Implicit in a useful administration of these laws and regulations is an assumption that men can be recognized as males and women as females.

Section 887(7) is an extension of the police power which must be upheld because of its relation to the health, safety, morals and welfare of the community. In these interests, the legislature has wisely enacted a statute which prohibits not all disguises or face coverings but only those which are intended specifically to prevent one from being identified. This minor restriction is neither arbitrary nor unreasonable in view of the confusion and chaos it prevents. See 59 Yale L. J. 1351, 1353 and nn. 7 and 8 (1950).

One final point. Even when society has a serious concern with the regulation of given conduct, that concern must on occasion yield to counterbalancing considerations. But that situation does not arise here, for there is no significant social value to be perceived in the defendant's activities. To prohibit men from dressing as women with an intent to deceive is to prohibit a pattern of behavior that is utterly without signification to a vital society.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

FRANK S. HOGAN
District Attorney
New York County

H. RICHARD UVILLER
ERIC A. SEIFF
Assistant District Attorneys
Of Counsel

June, 1965